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No. 06-1132

IN THE SUPREME COURT OF THE UNITED STATES

Tammy Adkins, et al.,
Petitioners,

v.

Robert M. Gates,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMERICAN RETIREES ASSOCIATION, AIR FORCE SERGEANTS ASSOCIATION, FLEET RESERVE ASSOCIATION, NATIONAL ASSOCIATION FOR UNIFORMED SERVICES AND THE RETIRED ENLISTED ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Is the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408, unconstitutional, inasmuch as the statute (a) was retroactively applied to those service members who entered the Armed Forces prior to its enactment; (b) invidiously discriminates between male and female veterans and their former spouses; (c) contains garnishment mechanisms that do not afford sufficient procedural due process to veterans, and (d) has provisions that permit divorce courts of different jurisdictions to treat veterans disparately?

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INTEREST OF *AMICI CURIAE*

Amicus curiae American Retirees Association (ARA)[1] is a non-profit organization, chartered expressly to deal with the impact of the Uniformed Services Former Spouses Protection Act (USFSPA) (10 U.S.C. 1408) on personnel of the military uniformed services. ARA members are active duty, retired, reserve and National Guard members of the uniformed services of both sexes. Joining the brief as *amici curiae* are the Air Force Sergeants Association (AFSA), Fleet Reserve Association (FRA), National Association for Uniformed Services (NAUS), and The Retired Enlisted Association (TREA).

Amicus curiae AFSA is a federally chartered, non-profit organization representing the professional and personnel interests of more than 130,000 active duty and retired enlisted members of the U.S. Air Force, Air National Guard, and Air Force Reserve.

Amicus curiae FRA is the oldest and largest organization representing active, reserve, veterans, and retired enlisted personnel of the U.S. Navy, U.S. Marine Corps and U.S. Coast Guard. It is federally chartered and recognized by the Department of Veterans Affairs as an accrediting Veteran Service Organization for claim representation. It represents the enlisted perspective on issues affecting the military.

Amicus curiae NAUS is the only military affiliated association whose membership is open to all of the uniformed services: Army, Navy, Air Force, Marine Corps, Coast Guard, U.S. Public Health Service, National Atmospheric and Oceanic

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1 Counsel for *amicus curiae* American Retirees Association (ARA) authored this brief in whole and no other person or entity, other than the ARA, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Administration, National Guard, and reserve forces. NAUS serves all ranks and grades and represents a broad spectrum of interests.

Amicus curiae TREA was founded more than 40 years ago to protect the benefits of those who have served a career in the enlisted ranks of the U.S. military. TREA is a federally chartered Veteran Service Organization. With 55,000 members and an additional 15,000 personnel in its auxiliary, TREA is the largest organization of enlisted personnel comprising all branches of the military.

Service in the Armed Forces of the United States creates a special trust between service members and the federal government. Service members endure years of hardship during military service, separated from the comforts of home, friends and family, while relying on the federal government to provide the tools they need to serve. One of these is the freedom from inappropriate control by foreign governments and States of the Union.

Service members are all volunteers who serve overseas and within the borders of the United States, as needs of the Armed Services dictate. As such, members do not ultimately control where they are assigned, but may be sent involuntarily to various states and nations. However, as a result of actions taken in furtherance of federal service, they can be subject to the jurisdiction of courts of states other than those of their legal residence. A central premise to the concept of a federal military is that there cannot be significant differences in the treatment of service members among states in matters that interfere with federal control of the military forces.

This Court recognized the strong federal interests in the military retirement system in its decision in *McCarty v. McCarty*, 453 U.S. 210 (1981), holding that the military retirement pay could not be divided by state courts. In response,

Congress passed the USFSPA,[2] retroactive to the *McCarty* decision, to allow state courts to divide military retirement/retainer pay in a divorce. This case challenges the USFSPA as not providing sufficient protection for service members in the event of a divorce, thereby severing that special trust between service members and the federal government.

Amici curiae ARA, AFSA, FRA, NAUS and TREA accept the factual basis provided by appellant's petition and hereby incorporate these facts by reference.

SUMMARY OF THE ARGUMENT

The retirement/retainer pay of the members of Armed Forces of the United States has been determined by this Court to be a very special type of compensation. If state courts are to be allowed to divide it during a divorce, the overwhelming federal interests and purposes in this pay must not suffer, nor should the due process rights of the service members involved suffer. However, both federal interests in military retirement pay and the due process rights of members do indeed suffer when state courts are essentially left unchecked to do what they please. Service members, whether on active duty or in the retired reserve, are fulfilling a federal purpose under the Constitution. States exercising their responsibilities for domestic issues must not be permitted to frustrate this federal purpose.

ARGUMENT

I. Review is necessary to establish that state court division of military retirement pay requires the establishment of

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2 Pub. L. No. 97-252, 96 Stat. 730 (1982)(codified at 10 U.S.C. § 1408 (2006)).

federal common law to address federal concerns in this area of substantial state and federal interests.

The issue of military divorce presents a question of mixed state and federal concerns that needs to be resolved to ensure that both equities are addressed. Since the ability to control marriage and divorce is not a federal power enumerated in the Constitution, it is reserved to the States. U.S. CONST. amend. X. However, the federal government is charged with administration of the Armed Forces. U.S CONST. art. I, § 8, cl. 12, 13 & 14. The intersection of these rights is of great concern to the Department of Defense, which devotes substantial efforts to family issues. *See Family Policy, Department of Defense Directive 1342.17* (1988). Through these efforts, the Armed Forces recognize the substantial and real impact that family concerns have on military readiness.

This unique intersection of state and federal interests in the issue of military divorce begs for the establishment of a federal common law regarding the treatment of federal military retirement/retainer pay.[3] This Court has previously noted the unique characteristics of the military retirement/retainer pay in the *McCarty* decision, 453 U.S. at 212-14. These unique characteristics were carried through when Congress passed the USFSPA, noting in the statute the uniqueness of this pay to members of the retired reserve. *See* 10 U.S.C. § 1408(c)(2).

The recognition of the need for "federal common law" on an issue is well established by this Court. Specifically, this

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[3] This brief will use the term "military retirement/retainer pay" instead of "military pension" because of the numerous conditions on the service member associated with accepting this pay. This also comports with the IRS definition of this pay in accordance with 26 C.F.R. S31.3401(a)-1(b)(1)(ii).

Court has found that when an issue is normally a matter of state law, but uniformity is required to attain federal objectives, creation of federal common law for the issue is justified. *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). Just as environmental matters that do not recognize state borders justify the existence of a federal common law, *see State of New York v. National Service Industries, Inc.*, 460 F.3d 201 (2nd Cir. 2006), the common defense of the United States cannot recognize state borders. U.S. CONST. pmbl. (providing for the "common defense"). Therefore, the creation of a federal common law for the issue of a military retirement/retainer pay is consistent with this Court's precedents.

The USFSPA does not provide appropriate guidance to the states to protect federal interests. In the absence of the USFSPA, this Court correctly decided that state courts cannot divide military retirement/retainer pay. *McCarty*, 453 U.S. at 210. However, the USFSPA, as a Congressional response to this Court's holding in *McCarty*, does not provide the mechanism to standardize the application of the law by state courts. Rather, it merely provides a mechanism for the military pay finance centers – the Defense Finance and Accounting Service (DFAS) -- to recognize and apply state court orders regarding division of military retirement/retainer pay. 10 U.S.C. § 1408(c) and (d).

In short, the USFSPA gives permission but not the guidance necessary to address valid federal concerns. Therefore, the USFSPA is fatally flawed and must be reviewed by this Court in that light.

II. The USFSPA creates an inappropriately low standard for a court order to divide military retirement/retainer pay that violates the due process rights of service members.

The USFSPA takes numerous impermissible shortcuts impacting due process in its attempt to create an easily-implemented process to deprive service members of pay to which they are legally entitled. The entitlement to military retirement/retainer pay is provided by federal law. 10 U.S.C. § 1409. It is legally considered to be "pay" because the member is still considered to be a member of the Armed Forces, *United States v. Tyler*, 105 U.S. 244, 246 (1881), subject to military justice, 10 U.S.C. § 802(a)(4) and involuntary recall to active duty. 10 U.S.C. § 688(a)-(b)(1). State court division of this pay, with no reduction in such federal requirements, deprives a member of a valuable personal entitlement.

The USFSPA, as the mechanism for this, bypasses normal due process protections. Beginning with the established standard that a citizen is subject only to the courts of his/her state, U.S. CONST. amend. XIV, §1, an out-of-state order for USFSPA need only be submitted to the military finance center by the former spouse. 10 U.S.C. § 1408(d)(1). The only requirement is that it be "regular on its face." 10 U.S.C. § 1408(b)(1)(B). There is no provision requiring validation of this order by the member's home state. In fact, the submission of a state's order appears to create an unrebuttable presumption that no other state's order is valid. 10 U.S.C. § 1408(d)(7).

Normally, a citizen may challenge enforcement of an out-of-state order against him in his own state, with the Constitutional requirement for honoring out-of-state orders based on "full faith and credit" subject to a finding that the court issuing the order had jurisdiction. *See, e.g., Jordan v. Jordan,* 586 A.2d 1080, 1085 (R.I.1991) (requiring subject matter and personal jurisdiction requirements to be met before enforcement of out-of-state judgments). However, the USFSPA violates this concept by honoring any order submitted by any state. By omitting a procedure to challenge court orders submitted in a

proper forum, the USFSPA violates the due process rights of affected service members.

III. The USFSPA has spawned a new source of jurisdiction that does not protect Constitutional rights of service members.

In the exercise of their powers granted by the USFSPA, states have gone beyond the normal confines of jurisdiction to create a new type of jurisdiction – "*in filium*[4]" – that violates the Constitution and public policy. The USFSPA allows states to divide military retirement/retainer pay in a divorce if the state has jurisdiction over the service member either through domicile, residence or consent. 10 U.S.C. § 1408(c)(4). Although the concepts of domicile and residence comport well with the commonly accepted interpretation of personal jurisdiction, the third method is open to unbridled judicial abuse.

The question of "consent" of the service member to the division of military retirement/retention pay by a state during a divorce proceeding has been answered differently by the several states. Some states require specific consent to the division of the military retirement/retainer pay, *see, e.g., Flora v. Flora*, 603 A.2d 723 (R.I. 1992), while other states find sufficient jurisdiction over the military retirement/retainer pay through any participation in the divorce proceedings. *See, e.g., Seeley v. Seeley*, 690 S.W:2d 626 (Tx. Ct. App. 1985).

For the service member with children, this situation may present a Catch-22 situation if the spouse unilaterally initiates a divorce action in a state where she/he qualifies to bring an action. In such cases, the service member may be locked into

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4 This reflects an attempt to name jurisdiction that is created through the child.

non-resident jurisdiction through no action of his/her own, but solely by the action of a now-adverse party.

It is logical for a court where minor children are located to provide for their welfare in a divorce. But if the service member participates at all in the action, courts in such states would find jurisdiction sufficient to trigger entry of an order to divide military retirement/retainer pay that would appear "regular on its face." To allow such action is counter to domestic relations public policy -- both parents should be able to participate in matters related to the children's welfare without putting their own interests at risk. Such a view is consistent with the Court-recognized concept of the "divisible" divorce. *See Rice v. Rice*, 336 U.S. 674 (1949).

Especially for active military members subject to deployments in support of military operations, consideration of the children's best interests may dictate allowing the non-military spouse to have unchallenged primary physical custody of minor children and cooperate in implementation of that custody without putting themselves in jeopardy.

The concept of implied consent to division of military retirement/retainer pay essentially creates a new type of jurisdiction to complement the well-recognized concepts of *in personam* jurisdiction, *in rem* jurisdiction, and *quasi in rem* jurisdiction. The commonly recognized concept of "consent" to relinquishment of a known right requires that it be "knowing." *Estelle v. Smith*, 451 U.S. 454, 471 (1981). State courts should not be able to use minor children to create personal jurisdiction in a divorce. In tripping over themselves to find personal jurisdiction over a service member to be able to divide military retirement/retainer pay, many state courts have ventured into Constitutional issues that should exclusively be the province of this Court.

CONCLUSION

The USFSPA, as passed by Congress to supercede this Court's reasoned holding in *McCarty*, suffers from fatal Constitutional flaws and should be reviewed by this Court by grant of the petition.

Respectfully submitted,

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